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No. 99-1852

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

ROBERT B. SKLAROFF, M.D.
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA
BY D. MICHAEL FISHER, IN HIS OFFICIAL CAPACITY
AS ATTORNEY GENERAL OF
THE COMMONWEALTH OF PENNSYLVANIA,
and
PHILIP MORRIS INCORPORATED, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Pennsylvania Supreme Court

REPLY TO BRIEFS FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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June 28, 2000

18 pp

ISSUES PRESENTED

I. Whether this Court **has** jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where all the Pennsylvania state courts' decisions did **not** rest on "adequate and independent" state law principles.

II. Whether this Court **has** jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where the Petitioner **has** satisfied the criteria for standing under Article III of the United States Constitution.

III. Whether this Court **has** jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania where the Petitioner **has** preserved a federal issue in the Pennsylvania state courts, and **has** raised federal issues in the petition.

IV. Whether the petition presents **many** issues worthy of review by this Court.

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INTRODUCTION

Petitioner Robert B. Sklaroff, MD, respectfully **reinforces** his petition for a Writ of Certiorari to review the judgment of the Pennsylvania Supreme Court in this case.

This document is written in response to submission of the two Briefs by the Respondents, Philip Morris Incorporated ["PM"] and the Commonwealth of Pennsylvania ["CoP"]. Also, it will provide an incremental update regarding the Petitioner's perception of the overall litigation status.

The CoP's Brief was received on the same day this Reply is being generated, so as to **ensure** the Court receives it prior to its summer recess. Pivotal to the capacity to achieve such prompt "turnaround-time" is concomitant submission of the Supplemental Brief, which focuses upon the PM Brief.

The Brief submitted by the CoP raises issues that were predominantly encompassed by that submitted by PM. Also, due to space limitations, other facets thereof will not receive detailed refutation (e.g., "Counter-Statement of the Case").

Direct conversations were held this past week with the attorneys representing both Respondents regarding the Amicus Curiae Brief submitted on June 19, 2000 by the Honorable Jon D. Fox. The goal was to see if either had any opposition to the Court's review of this document, an effort that was intended to facilitate efficient discharge of the judicial process. Both attorneys demurred; the CoP is still reviewing the document and PM hasn't read it yet. The PM attorney said he had been told that Mr. Fox was not presently a member of the Bar of the U.S. Supreme Court, but Mr. Fox reports he was admitted on April 14, 1980 following his having been recommended by CoP Senator Hugh Scott.

The PM Brief reports three states have not yet begun to receive annual allocated payments due to their having achieved state-specific finality by having approved the Master Settlement Agreement ["MSA"]. The legal issues that may pend will be clarified and reported to the Court if they are deemed relevant to those raised in the instant case.

RE-STATEMENT OF THE CASE

The MSA between *inter alia* PM and *inter alia* the CoP was the largest civil litigation settlement in world history. Its obvious defects, however, threaten to protect the Tobacco Industry ["TI"], including PM, against prosecution for current and future misconduct until/unless the deficient clauses therein have been amended or expunged, the consistent goal of Dr. Sklaroff's litigation (and Petition).

The Philadelphia Court of Common Pleas determined that Dr. Sklaroff lacked standing to bring this action because, **at that time**, he was adjudged not to have demonstrated he had a legally enforceable interest. **Since that time**, however, he filed litigation against PM, for two violations of the MSA. Currently, it pends before the Pennsylvania Superior Court. Oral argument was held on June 27, 2000, in Philadelphia.

The Commonwealth Court of Pennsylvania determined that Dr. Sklaroff lacked standing to bring this action because, **at that time**, the particular conduct that had prompted filing of the aforementioned suit against PM had ostensibly ceased. **Since that time**, however, PM has demonstrated recidivism (predicted by Dr. Sklaroff) and comparable conduct has been noted both elsewhere in the CoP and throughout America.

Because he discovered additional violations of the MSA, Dr. Sklaroff then asked the CoP's Attorney General ["AG"] to enforce it. Because the AG **failed** to do so, Dr. Sklaroff filed litigation in Commonwealth Court—acting in its primary jurisdiction—an approach that had been advised in the Opinion of Judge John Herron of the Philadelphia Court of Common Pleas with regard to the Superior Court case. Currently, it pends before the Commonwealth Court. Briefs have been filed, but Oral Argument has not been scheduled.

PM has mischaracterized this effort as frivolous—ignoring Commonwealth Court Judge James Kelley—because it wishes **forever** to enjoy indemnification for future misconduct, in which it already has become engaged. It is believed this outcome will occur if this Petition is denied.

In this Petition, three **Constitutional Amendments** were cited: I ["Congress shall make no law. . .abridging . . .the right of the people. . .to petition the government for a redress of grievances."]; V ["No person shall. . .be deprived of life, liberty, or property, without due process of law. . . ."]; XIV ["No state shall. . .deprive any person of. . .due process."].

This Court should allow Dr. Sklaroff to work to ensure the MSA does not give unconstitutional levels of immunity to the TI and approve his petition on the grounds that: (1) the Pennsylvania courts' decisions were **not** based on adequate and independent state grounds; (2) Dr. Sklaroff **merits** standing; (3) federal issues **have** been properly presented for review by this Court; and (4) Dr. Sklaroff's petition raises numerous issues **worthy** of this Court's review.

Because all questions raised by the CoP are encompassed by those in the PM's Brief, this Reply Brief addresses only the above. Specifically, the CoP's "Counter-Statement of Basis for Jurisdiction" avers a federal question has belatedly been "manufactured," despite the fact that numerous federal questions have been raised throughout the past 1½ years.

ACCURATE PROCEDURAL HISTORY

On April 23, 1997, the AG of the CoP filed litigation against the TI seeking damages, recovery of Medicaid and other medical payments and injunctive relief [*Commonwealth of Pennsylvania v. Philip Morris Incorporated,* No. 2443 (Philadelphia County Ct. C. P. Ap. 23, 1997)]. It is **not** true, however, that the subsequently-negotiated MSA forced the TI "to pay the CoP $11.26 billion over the next 25 years" because this calculation was subject to various adjustments that have, already, decreased the annual allocated payment. It is **not** true, also, that the TI "agreed to numerous restrictions that otherwise could not have been imposed by court order," inasmuch as comparable restrictions had indeed resulted from prior state-level tobacco-related litigation (e.g., the Minnesota settlement banned payment to media for product placement).

Anti-tobacco activists in the CoP, including Dr. Sklaroff, immediately challenged the MSA's approval in 1998. It is **not** true that they were "not opposing the negotiation or conclusion of the MSA," inasmuch as they emphasized, in the concluding paragraph of the initial Common Pleas Court Brief, the fact that they had been excluded from this process:

> Until November of 1998, just before the MSA made the transition from secret to public, the Attorney General assured Petitioners that they had nothing to worry about, and that their goal would be achieved. It was only upon the publication of the previously guarded MSA provisions, when Petitioners learned that their interests had been sacrificed in favor of the tobacco defendants' desire for immunity. At that point, the petitioners knew they were harmed, and they acted promptly.

The Herron Opinion, indeed, cited *PRCPs 2326-2329, Pennsylvania Crime Commission Subpoena,* 309 A 2d 401 (Pa. 1973) and *Sierra Club v. Hartman*, 605 A.2d 309 (Pa. 1992) in rejecting the provision of standing, but it is **not** true that Federal Constitutional issues were not prominent therein. Indeed, immediately following the aforementioned citations, Judge Herron "climaxed" thusly:

> In analyzing whether a particular case presents such a non-justiciable political question, the Pennsylvania Supreme Court has repeatedly emphasized the criteria set forth by the United States Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

He then cited *Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165, 1169 (1981), quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962) and, in footnote #74, cited additional cases thusly: "The Pennsylvania Supreme Court has relied on the *Baker v. Carr* analysis in other cases where it considered whether a particular case presented a nonjusticiable political question." The root forces invoked when interpreting this entire case were framed in a **federal** context at the start of the process.

In all his appeals, "Dr. Sklaroff argued that the lower courts had failed to apply Pennsylvania state law properly." It is **not** true that this was the **sole** basis for these efforts, for this **federal** concern is in prior filings, plus the Writ:

> The petitioner—functioning as a citizen, taxpayer, father, activist, physician, private AG and litigant—should not be deprived of standing to intervene prior to final approval of the Master Settlement Agreement between the Tobacco Industry and the Commonwealth of Pennsylvania, under state and **federal** law, based upon his current and future civil and due-process constitutional rights.

Dr. Sklaroff's Petition elucidated myriad reasons why he *inter alia* merits standing; it is **not** true that this is a meritless or irrelevant argument, inasmuch as Judge Kelley validated applying such concerns to others excluded from this process.

Dr. Sklaroff's Petition cited a "subsequent lawsuit against PM." It is **not** true that it is "completely separate from this case and is not a part of the record here," because it has been **included** in the record (at multiple sites) and has been **cited** throughout the appellate process as illustrative of the legally enforceable interest invoked to yield "standing."

Dr. Sklaroff seeks "required judicial review of the MSA."

SUMMARY OF ARGUMENTS

This Court should grant a Writ of Certiorari in this matter for the following reasons. First, the CoP courts' decisions that are the subject of Dr. Sklaroff's petition did **not** turn on adequate and independent state grounds. Second, Dr. Sklaroff **has** alleged the requisite standing to bring this petition under Article III of the U.S. Constitution. Third, Dr. Sklaroff's petition raises numerous **federal** issues that have been properly preserved for review by this Court. Finally, Dr. Sklaroff's petition raises issues **worthy** of this Court's review. Thus, this Court should accept the petition.

REASONS FOR APPROVING THE WRIT

I. This Court has jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania, where all the Pennsylvania state courts' decisions did not rest on "adequate and independent" state law principles.

PM cited four cases in order to support the view that the Writ should not be issued because the state-level adjudication had been "adequate and independent." [*ASARCO, Inc. v. Kadish,* 490 U.S. 605 (1989), *Coleman v. Thompson,* 501 U.S. 722 (1991), *Herb V. Pitcairn,* 324 U.S. 117 (1945) and *Michigan v. Long,* 463 U.S. 1032 (1983).]

Each citation, however, was **incomplete** and the facts of this case undermined PM's intended conclusion. Therefore, prior opinions in this case were, admittedly, not predicated only on "adequate and independent" state-level grounds.

II. This Court has jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania, where the Petitioner has satisfied the criteria for standing under Article III of the United States Constitution.

PM cited eight cases in order to support the view that the Writ should not be issued because of the absence of standing. [*ASARCO, Inc. v. Kadish,* 490 U.S. 605 (1989), *Fairchild v. Hughes*, 258 U.S. 126, 129 (1922), *Flast v. Cohen,* 392 U.S. 83 (1968), *Gladstone, Realtors V. Village of Bellwood,* 441 U.S. 91 (1979), *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992), *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976), *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., et al.,* 454 U.S. 464 (1975), *Warth v. Seldin,* 422 U.S. 490 (1975).]

Each citation, however, was **incomplete** and the facts of this case undermine PM's intended conclusions. To aver the converse of PM's assertion, Dr. Sklaroff has standing based both upon federal and state criteria.

III. This Court has jurisdiction to issue a writ of certiorari to the Supreme Court of Pennsylvania, where the Petitioner has preserved a federal issue in the Pennsylvania state courts, and has raised federal issues in the petition.

The Briefs and Opinions in this case include federal citations of specific cases and statutes that were invoked in the state court system, but the interpretation of which is now subject to review by the U.S. Supreme Court.

The cases include: *Baker v. Carr*, 369 U.S. 186, 217 (1962); *Blue Cross and Blue Shield of New Jersey, Inc. v. Philip Morris, Incorporated*, 36 F.Supp.2d 560 (E-D. N.Y. 1999); *Georgine et al v. Amchem Products, Inc. et al.*, 83 Fed 3rd 610; *Hawaii v. Standard Oil Company*, 405 U.S. 251, 257 (1972); *In re: General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation*, 65 Fed 3rd 768; *In re: Washington Public Power Supply System Sec. Litig.*, 720 F.Supp. 1379, 1387 (D.Ariz. 1989), *aff'd Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir. 1992, *cert. Denied*, 506 U.S. 953; *Reverend Jessie Brown, et al. v. Philip Morris, Inc., et al.*, U.S. District Court for the Eastern District of Pennsylvania, Civil Action No. 98-5518; and *Zemprelli v. Daniels*, 496 Pa. 247, 436 A.2d 1165, 1169 (1981). The statutes include 42 U.S.C. 1981 & 1982, and 42 U.S.C. 1981.

The pleadings and the opinions rendered in this case have fundamental **federal** underpinnings; furthermore, state-level interpretations of such issues as due process were predicated on **federal** law. PM admitted the Petition was "premised **almost** exclusively on interpretations of Pennsylvania state law" ["Counter-Statement of the Case"] thereby admitting it included interpretations of non-state (**federal**) law.

PM's legal citations corroborate the view that Dr. Sklaroff's appeal has properly posed fundamental federal issues for consideration by the Court.

PM cites the fact that, except in rare instances, the Supreme Court has "adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson,* 520 U.S. 83 (1997).

Unlike *Adams*, however, the instant case fits key criteria: (1) federal due process claims were raised initially and subsequently by citing the Constitution (rather than simply relying upon citation of the words "due process"); (2) discussion of federal cases was not immersed in unrelated argument [citing *Board of Directors of Rotary International v. Rotary Club of Duarte,* 480 U.S. 537 (1987), *vide infra*]; (3) no court could fairly have read these citations (both individually and in the aggregate) as merely referencing narrow state-level questions; (4) specific reference has been made to the places in the record where the matter appears [Supreme Court Rule 14.1(g)(i)]; (5) the minimum requirement was met that a federal claim was presented [*Webb v. Webb*, 451 U.S. 493, 496-497, 501 (1981) & *Bowe v. Scott*, 233 U.S. 658, 664-665 (1914)] and (6) there can be no doubt that **federal** issues were raised when the statement of the first question posed under the Petition specifically cited **federal** due process.

PM cites *Board of Directors of Rotary International v. Rotary Club of Duarte,* 480 U.S. 537 (1987) to support its view that "When 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " In the instant case, as noted earlier, Dr. Sklaroff could not force the CoP Supreme Court to rule; thus, its judgment was directly derived from that of the Commonwealth Court which had weighed **federal** issues.

Thus, **federal** issues permeated the initial complaint, appeals generated therefrom, opinions derived therefrom and the proper presentation of this case at both the state and federal levels. The characteristics thereof meet all legal citations provided by PM, and necessitate rectification by the U.S. Supreme Court.

IV. The petition presents many issues worthy of review by this Court.

In the Supplemental Brief, an elaborative rejoinder was provided to this argument by PM. Rather than summarizing the myriad concerns raised in this litigation, the focus of this Reply Brief will be upon both the content and the tone of the CoP's Brief. For example, aspersions were cast therein, such as reference to litigation filed by Dr. Sklaroff after he was denied due process rights by an organization that had used him to silence opposition raised by the hospital medical staff. That the CoP's AG has filed suit against this entity should serve to illustrate that Dr. Sklaroff's goal was to gain court recognition of that organization's cavalier approach to the common rule of law (in his case, the Medical Staff Bylaws). [*Robert B. Sklaroff, MD v. Allegheny Health Education and Research Foundation, et al.*, 1996 W.L. 665519 (E.D. Pa. Nov. 12, 1996), *aff'd without opinion*, 118 F.3d 1578 (3d Cir. 1997)]. Nevertheless, the CoP cannot claim "frivolity" in this case because *inter alia* of the existence of the cogent Minority Opinion of Commonwealth Court Judge Kelley.

Specific reference must be made to the issue of mootness [the CoP's point #2] inasmuch as the incredible claim seems to be made that any degree of finality occurred in a lower court that is presently not subject to the adjudication of the U.S. Supreme Court. It is stated that "there is no case in which to intervene" because of the dismissal of all claims with prejudice by Judge Herron, despite the fact that the unchallenged litigation history clearly encompasses appellate review of all prior actions in the CoP related to the MSA.

Finally, the CoP raises the "abuse of discretion" criterion as an absolute bar from appellate review by this Court, despite the fact that it is a legitimate issue to be raised. Again illustrating how the Settling Parties would not wish reference be made to the pending litigation against PM, standing is argued not to exist because of the lack of any type of "legally enforceable interest"; it would be far more intellectually honest were either Settling Party to address the unassailable existence of this litigation (and argue whether it is somehow not applicable) rather than to engage in denial.

The CoP disdainfully states Dr. Sklaroff "has never made any pretense of satisfying the requisites for intervention set forth in the Pennsylvania Rules of Civil Procedure," ignoring the fact that these have continuously driven his arguments. Further, the CoP states "Sklaroff simply continues to rail against the merits of the MSA," despite the fact that he has raised only two key concerns (immunity and offset) therein.

Finally, the CoP charges that Dr. Sklaroff's Petition "contains numerous misstatements of the Tobacco Settlement and the course of this appeal" while providing but one example thereof ["The Commonwealth did not dispute his interpretation of the MSA, including claims such as that the MSA settles future claims of minors. These assertions are irresponsible and inaccurate."] Dr. Sklaroff's briefs document this assertion, both in the Common Pleas Court representations and in contemporaneous public statements. Indeed, he has repeatedly offered to withdraw his litigation were the CoP's AG merely to stipulate any such quotations. Such efforts to settle this litigation, however, have been constantly (and arrogantly) rebuffed (privately and publicly).

CONCLUSION

Therefore, Robert B. Sklaroff, MD requests remand of the MSA to the CoP's Philadelphia Court of Common Pleas.

Respectfully submitted,

Robert B. Sklaroff/MD